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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

STEPHEN H. DEMAREST,
Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

AMICUS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Whether the denial of retained counsel to applicants for veterans' benefits, imposed by a $10.00 limit on attorneys' fees under 38 U.S.C. §3404 and enforced by criminal sanctions, is offensive to the Due Process Clause of the Fifth Amendment of the United States Constitution.

INTEREST OF AMICUS FEDERAL BAR ASSOCIATION

The Federal Bar Association (FBA) is an association of more than 15,000 attorneys whose practice and professional interests focus upon various aspects of federal law, including those related to veterans of the armed services. The mission of the FBA is to advance the science of jurisprudence and to promote the welfare, interests, education, and the professional growth and development of the members of the federal legal profession. The FBA is composed of 105 Chapters throughout the world, with 14 National Councils comprising 85 Substantive Law Committees, integrating the individual members, and their particular fields of interest, into the whole of the organization.

At its 1983 Convention, the Federal Bar Association adopted a resolution calling for the repeal of the fee limitation contained in Title 38 U.S.C. §§3404 and 3405.

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SUMMARY OF ARGUMENT

Over a century ago, Congress enacted §§3404 and 3405 to Title 38 of the U.S. Code. These sections impose a $10.00 per claim limitation on the amount of attorneys' fees payable for representing a veteran in a disability claim before the Veterans Administration. This limitation effectively denies a claimant the ability to retain counsel in disability compensation proceedings before the Veterans Administration. Amicus agrees with petitioner's argument that the ability to retain counsel is a critical component of procedural due process in an administrative proceeding involving a claim for benefits. Accordingly, the $10.00

limitation on attorneys' fees deprives claimant of procedural due process in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

Judicial deference to the Congressional decision to limit attorneys' fees would be inappropriate because the issue here is one of constitutional proportion. Accordingly, this Court is being properly asked to exercise its Article III authority to consider the constitutionality of the $10.00 cap on attorneys' fees.

Deference to Congressional judgment would also be inappropriate because Congress never specifically considered the constitutionality of the limitation on attorneys' fees. When it enacted §§ 3404 and 3405, Congress considered these statutes exclusively in terms of protecting veterans from unscrupulous attorneys.

Proposed legislation, presently stalled in the House of Representatives, would amend the limitation on attorneys' fees. However, the broader purpose of the bill is to permit judicial review of final determinations by the Veterans Administration. Although Congress has extensively considered the constitutionality of the bar to judicial review, the proposed amendment to the cap on attorneys' fees has been viewed only in terms of implementing judicial review. Congress did not specifically consider the constitutionality of the attorneys' fee limitation. Accordingly, this case falls within the category of cases recognized by this Court as exceptions to the customary judicial deference to Congressional judgment.

ARGUMENT

I. DEFERENCE TO CONGRESSIONAL JUDGMENT IS INAPPROPRIATE BECAUSE THE ISSUE IN THE PRESENT CASE IS ONE OF CONSTITUTIONAL PROPORTION.

It is axiomatic that the role of the Supreme Court is to safeguard the rights and privileges guaranteed by the Constitution. Thus, in the seminal case, *Marbury v. Madison*, 5 U.S. 137 (1803), the Supreme Court established that Article III authorizes the Judiciary to review the conduct of coordinate branches of government to determine the constitutionality of legislative action. Thus, the doctrine of separation of powers may sometimes require judicial action to check the excesses of the other branches of government[1] Accordingly, the Court may consider the constitutionality of a particular statute or portion thereof.

In the present case, petitioner is asking the Court to consider the constitutionality of the $10.00 cap on attorneys' fees contained in 38 U.S.C. §§3404 and 3405. This request is of constitutional proportion. In granting the request, the Court would therefore exercise its proper judicial function and need not defer to Congressional judgment.

II. DEFERENCE TO CONGRESS IN THE PRESENT CASE IS UNWARRANTED BECAUSE CONGRESS HAS FAILED TO SPECIFICALLY CONSIDER THE CONSTITUTIONALITY OF THE ATTORRNEYS' FEE LIMITATION.

In *Rostker v. Goldberg*, 453 U.S. 57 (1981), the Supreme Court considered the constitutionality of Congress' failure to amend §3 of the Selective Service Act to

[1]This aspect of the Doctrine of Separation of Powers reveals itself in the fact that the Senate is authorized under Article I, §3, to impeach the president; the president may veto legislation enacted by Congress, and Congress may restrict the jurisdiction of the lower federal courts.

provide for registration and conscription of women pursuant to President Carter's request. As a preliminary matter, the court addressed its authority to consider the matter, observing that "the call to judge the constitutionality of an act of Congress is the greatest and most delicate duty that this Court is called upon to perform." (Quoting Justice Holmes in *Blodgett v. Holden*, 275, U.S. 142 (1927).) The Court determined that the customary deference accorded Congress is appropriate only when Congress specifically considered an act's constitutionality. The Court deferred in *Goldberg* after concluding that Congress had extensively considered the constitutionality of the gender-based discrimination underlying §3 of the Selective Service Act.[2]

The standard enunciated in *Goldberg* as to when the Judiciary should refrain from infringing on the legislative province precludes deference in the instant case. Congress never specifically considered the constitutionality of the cap on attorneys' fees. Report to Accompany S-349, 97th Cong., 2d Sess. (June 8, 1982), p. 49. Indeed, that anomalous provision, dating back to the Civil War, was clearly intended to protect generally indigent veterans from unscrupulous attorneys when pursuing claims before the Veterans Administration. *Id.*

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[2]The court also determined that deference to Congress was appropriate because the question of registering women for conscription involved Article I, §8 powers to raise and regulate an able militia. It should be noted that this rationale is not applicable to the present case. Unlike a constitutional challenge to military regulations governing appearance and conduct, e.g., *Parker v. Levy*, 417 U.S. 733 (1974); *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1974), and unlike the issue in *Golberg*, this case involves the ability of veterans to adequately pursue their claims in an adversarial proceeding before the Veterans Administration. In no way does the issue in this case implicate Congressional Article I, §8 powers.

Congress has made several attempts to enact legislation amending the attorneys' fee limitation. These efforts have failed repeatedly. The current proposed legislation is primarily concerned with eliminating the statutory bar to judicial review of Veterans Administration determinations in connection with individual benefits claims.

While the Senate held extensive hearings on the bill to consider the constitutionality of the statutory bar to judicial review, neither it nor the House of Representatives, where the bill has repeatedly stalled, specifically addressed the constitutionality of the attorneys' fee limitation itself. In fact, the articulated rationale for amending the atttorneys' fee provision is to implement judicial review.[3] *See generally,* Report of the Senate Committee on Veterans Affairs to Accompany S-349, No. 97-166, 97th Cong., 2nd Sess., June 8, 1982. As expressed in the Committee Report, amending the cap on attorneys' fees would enable counsel to be present and to develop a comprehensive administrative record for judicial review. Report to Accompany S-349, *supra,* at pp. 49-51.

[3]The proposed amendment was also discussed in terms of its overall impact on already existing agency procedures.

CONCLUSION

Amicus agrees with petitioner's argument that the limitation on attorneys' fees is an unconstitutional violation of the due process clause for the reasons discussed by petitioners in their petitition for certiorari. Congressional failure specifically to consider the constitutionality of the attorneys' fee limitation brings this action within the category of cases which are exceptions to the customary judicial deference to Congressional judgment, and the Court should therefore not defer to Congress in this case.

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